Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

WILLIAM A. APPLING, et al.,
Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, et al.,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL APPENDIX FOR WRIT OF CERTIORARI

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June 08, 2004

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APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

WILLIAM APPLING, et al.,	)	No. C 97-1569 MJJ
	)	
Plaintiffs,	)	**ORDER DENYING**
	)	**PLAINTIFFS' MOTION**
v.	)	**FOR PARTIAL**
	)	**SUMMARY**
STATE FARM MUTUAL	)	**JUDGMENT AND**
AUTOMOBILE INSURANCE	)	**GRANTING**
CO.,	)	**DEFENDANTS'**
	)	**COUNTERMOTION**
Defendant.	)	**FOR PARTIAL**
	)	**SUMMARY**
_____/	)	**JUDGMENT**

INTRODUCTION AND FACTUAL BACKGROUND

Before the Court are the parties' cross-motions for partial summary judgment. Plaintiffs (collectively "Appling") move for partial summary judgment on the termination provision of the State Farm employment contracts, which State Farm contends allow termination of the contract at will, and Appling contends can be terminated only for cause. Appling relies on the unpublished Ninth Circuit disposition in *Sandberg v. State Farm*, No. 97-55971 (May 13, 1999), finding that the State Farm agent employment contract was susceptible to a good cause termination reading, as collateral estoppel from relitigating the contractual interpretation issue in this case. State Farm contests *Sandberg's* entitlement to collateral estoppel effect on several bases, and has countermoved the Court for the determination that the employment contracts are

integrated and unambiguously provide that employment is terminable at will.

Appling's motion implicates a subset of 28 of the agent plaintiffs, all of whom have been terminated as State Farm agents for a variety of alleged transgressions, including, *inter alia*, eliciting improper matching contributions from the State Farm Foundation and refusing to attend mandatory training sessions. Specifically, Appling moves for summary judgment on count 3 of the Sixth Amended Complaint, counts 12 and 14 of the Gilmore/Walker and Castroll/Lewis supplemental complaints, and count 1 of the Pyorre/Wier supplemental complaints. Assuming *arguendo* the failure of their collateral estoppel argument, Appling argues in the alternative that extrinsic evidence demonstrate that the contract was terminable only upon good cause, and thus that a breach of covenant claim may lie against State Farm.

State Farm's counter-motion would eliminate the terminated agents' breach of implied covenant claims of the terminated agents, implicating counts 3, 4 and 5 of the Sixth Amended Complaint, counts 12, 13 and 14 of the Castroll/Lewis supplemental complaint, counts 17, 18 and 19, of the Gilmore/Walker supplemental complaint, and counts 1, 2 and 3 of the Pyorre/Wier supplemental complaint. The contracts at issue (the AA3, AA4 and AA660)[1] all provided specific language regarding the termination of the contract. For the agent contracts, the relevant language reads: "You or State Farm have the right to terminate this Agreement by written notice delivered to the other or mailed to the other's last known address." AA3 and AA4 Agreements, section III(A); AA660

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1 Eighteen plaintiffs sue under the AA3 agreement (agent or corporate form), nine under the AA4 agreement, and one under the AA660 agreement. (Brick Decl., Exh. J).

Agreement, section III(1). The corporate versions of these same agreements provide similar language. All of the contracts at issue also provide that the written agreements supersede all prior written and oral representations between the parties, and incorporate an integration clause which reads: "This Agreement constitutes the sole and entire agreement between the parties hereto, and no change, alteration, or modification of the terms of this Agreement may be made except by agreement in writing signed by an authorized representative of the Companies and accepted by you." AA3 and AA4 Agreements, section VI(E); AA660 Agreement, section V(5). The agent contracts feature a termination review clause, whereby any terminated agent is guaranteed the ability to contest the basis for his or her dismissal by petitioning a regional board and, ultimately, to have the termination reviewed by the President of the company. AA3 Agreement, section III.B; AA4 Agreement, section III.B; AA660 Agreement, section III.2. The corporate version of the contracts does not include the termination review guarantees.

LEGAL ANALYSIS

I. Appling's Motion

A. Legal Standard

In invoking the *Sandberg* decision, Appling seeks to use the doctrine of offensive collateral estoppel to foreclose the Court's inquiry into the meaning of the termination clause provision. Offensive collateral estoppel permits a plaintiff in a subsequent litigation to foreclose litigation of a given issue, where that issue has been decided against the same defendant in a prior judgment. In *Parklane Hosiery v. Shore*, 439 U.S. 322 (1979), the Supreme Court Found that despite the traditional requirement of mutuality in applying collateral estoppel, the doctrine was appropriate in certain, non-mutual circumstances. *Parklane Hosiery* emphasizes that the trial

court is accorded broad discretion in determining when and how collateral estoppel is to apply. 439 U.S. at 331. *Parklane Hosiery* notes that offensive collateral estoppel does not promote judicial economy in the same manner as defensive collateral estoppel does. *Id.* at 329. The Court noted several scenarios illustrating the potential for unfairness in wooden application of offensive collateral estoppel. *Id.* at 329. The Court noted several scenarios illustrating the potential for unfairness in wooden application of offensive collateral estoppel. *Id.* at 330-331. Among them was a scenario whereby "the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant." *Id.* at 330.[2] The Ninth Circuit has reemphasized *Parklane Hosiery's* teaching that applications of offensive collateral estoppel is within the broad discretion of the trial court. *See, e.g., Robi v. Five Platters*, 838 F.2d 318, 329-330 (9th Cir. 1988). With these discretionary principles in mind, the Court turns to a consideration of the relevant factors in the context of *Sandberg*.

B. The *Sandberg* Opinion

Last year, a Ninth Circuit panel issued an unpublished memorandum affirming summary judgment in favor of State

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2 Professor Currie's hypothetical railroad collision, explained in footnote 14 of *Parklane Hosiery*, 439 U.S. at 330, illustrates this point. Were a train carrying 50 passengers to derail, and passengers 1 through 26 all individually unsuccessful in holding the railroad liable for negligence, Professor Currie opines that a favorable judgment for passenger 27 should not entitle passengers 28 through 50 to prevail as a matter of estoppel. While prior judicial interpretations on this issue are not so numerous, they were, prior to *Sandberg*, unanimous. *See infra*.

Farm in a wrongful termination case. *Sandberg v. State Farm*, No. 97-55971 (May 13, 1999). In that case, Sandberg (a State Farm policy holder policyholder as well as an agent) was terminated after he brought a suit for fraud against State Farm on his own policy, seeking punitive damages. The Ninth Circuit undertook a two-part, *de novo* analysis of the contractual interpretation of termination language, following *Brinderson-Newberg Joint Venture v. Pacific Erectors*, 971 F.2d 272, 277 (9th Cir. 1992). Under the test, the Court first affirmed the district court's finding that the contract was fully integrated. Slip Op. at 3. The court then moved on to analyze the termination provision. It relied explicitly on two sources of extrinsic information supporting Sandberg's argument that the agreement was terminable only for cause: (1) the previous agency agreement, which had provided that termination was possible "with or without cause", had been modified to omit the quoted term; and (2) a 1977 article by State Farm's vice president that asserted that the termination review procedure would ensure that termination would occur only when the file "clearly supports a serious violation of a contract agreement" Slip Op. at 3-4.

From this extrinsic evidence, the Court parted company with the district court's conclusion, and found: "Viewing the evidence most favorable to Sandberg, we hold that the agreement is reasonably susceptible to a termination-for-cause interpretation."[3] Slip Op. at 4. In support of this conclusion, the *Sandberg* court cited to three cases (*Wallis v. Farmers Group, Inc.*, 269 Cal.Rptr. 299, 306-7 (1990), *Jack Rowe Associates, Inc. v. Fisher Corp.*, 833 F.2d 177, 181 (9th Cir. 1987), and *Sherman v. Mutual Benefit Life Ins. Co.*, 633 F.2d 782 (9th Cir. 1980)) interpreting California law to allow oral or other extrinsic evidence to modify an otherwise at-will termination

provision. The Court cited no case interpreting the State Farm termination clause to be at will.

The Ninth Circuit ultimately affirmed the district court's holding, however, since it found that the basis for Sandberg's termination constituted good cause. "While we agree with Sandberg's interpretation that the agency agreement limited termination to good cause, we hold that Sandberg's claim for punitive damages is sufficient 'good cause' to support State Farm's decision to terminate." Slip Op. at 5. Thus, *Sandberg's* affirmance of the district court judgment does not rely directly on its disagreement with the district court's finding of at will termination, and would have arrived at the same conclusion even had it agreed.

C. State Farm's Attacks on Collateral Estoppel

State Farm urges the Court to utilize its discretion to disregard its potentially preclusive effects of *Sandberg* as collateral estoppel on all four prongs of the *Parklane Hosiery* test. Specifically, State Farm alleges: (1) Sandberg's finding on the termination clause provision was contrary to previous court treatments of the same issue, and thus would be unfairly relied upon for its preclusive effect; (2) the finding itself was not a fully and necessarily litigated part of the judgment, in that the opposite determination would not have altered the ultimate holding reached; (3) since State Farm actually prevailed on the merits of the decision, preclusion against it would be legally inappropriate; and (4) amplifications in the relevant state law occurred after submission, and prevented a full and fair opportunity to litigate the interpretation issue.

The Ninth Circuit Rules provide that the *Sandberg* memorandum is to be given collateral estoppel effect, or otherwise be completely disregarded. Rule 36-3 prohibits the

citation to or reliance upon unpublished dispositions of the Ninth Circuit unless they are given preclusive effect.[4] Accordingly, the Court must disregard the memorandum entirely in its determination of the merits of this case, if it should deny collateral estoppel based on the *Sandberg* memorandum

1. Holding Contrary to Prevailing Law

There is no argument that *Sandberg* represents the first and only of several Court rulings on the State Farm agent agreement termination clause interpretation issue to find that the language was even susceptible to a good cause termination reading. All other courts considering the effect of the State Farm contractual termination provisions have reached the opposite conclusion. *Mooney v. State Farm*, 344 F.Supp. 697 (D.N.H. 1972); *Vitkauskas v. State Farm*, 509 N.E.2d 1385 (Ill. App. Ct. 1987); *Melnick v. State Farm*, 106 N.M. 726 (N.M. 1988); *Drum v. State Farm*, S. F. Superior Ct. Case No. 991165 (Nov. 30 1998) (Req. Jud. Not., Exh. A); *Lotten v. State Farm*, Contra Costa Superior Ct. Case No. 97-01951 (July 30, 1998) (Req. Jud. Not., Exh. B); *Peters v. State Farm*, Case No. 82-2177-S (D. Kan. 1996) (Req. Jud. Not. Exh. C); *Scola v. State Farm*, Case No. 1-49685 (1st Dist. 1981) (Req. Jud. Not., Exh. D). On the other hand, Appling contends that *Sandberg* is consistent with *Wallis*, and is thus appropriately relied upon as an articulation of California law.

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4 Rule 36-3 reads: "Any disposition that is not an opinion or an order designated for publication under Circuit Rule 36-5 shall not be regarded as precedent and shall not be cited to or by this Court or any district court of the Ninth Circuit, either in briefs, oral argument, opinions, memoranda, or orders, except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel."

The Ninth Circuit has confirmed that the fairness principles outlined in *Parklane* are particularly acute where the judgment asserted is inconsistent with prior rulings in favor of the defendant. *See Robi*, 838 F.2d at 330. In the District of Columbia Circuit, inconsistency of prior judgments alone is a basis for denying the application of offensive collateral estoppel. *Jack Faucett Assocs. v. American Telephone & Telegraph Co.*, 744 F.2d 118, 125-6 (D.C. Cir. 1984). While the law is not so categorical in this Circuit, it is clear under *Parklane Hosiery* that a ruling at odds with prior judicial determinations of the same factual issue presents questions of fundamental fairness to the defendant. The Court, accordingly, takes note of the stark landscape of inconsistent prior interpretations of the termination clause, and finds that this factor weighs heavily in favor of granting *Sandberg* no preclusive effect. Because that determination alone is not enough to resolve the question, the Court moves on to the other *Parklane Hosiery* factors.

2. Finding For Which Estoppel is Sought Unnecessary to Holding

State Farm's second argument is that the finding that the contractual provision was a good cause termination provision was not necessary to the judgment. Necessity to the underlying judgment is a prerequisite under *Parklane Hosiery* for invoking offensive collateral estoppel. *Carter v. U.S.*, 973 F.2d 1479, 1482 (9th Cir. 1992.). The Ninth Circuit has found this to be the case for subsidiary factual holdings adverse to a prevailing party. *See, e.g., U.S. v. Good Samaritan Church*, 29 F.3d 487 (9th Cir. 1994). *Good Samaritan* is instructive on this point. There, the appellant had won below on a quiet title action against the IRS. In reaching its holding on title, the district court found that Good Samaritan was the alter ego of the trasnferor of title. Citing *Montana v. U.S.*, 440 U.S. 147, 153 (1979), the Ninth Circuit held that for issue preclusion to operate, the alter ego determination would have had to be

necessarily determined in the district court decision. "The district court dismissed the government's case because the government did not give proper notice. It could have reached that decision regardless of how the alter ego issue came out, or without reaching the alter ego issue at all." 29 F.3d at 489. The court concluded that the alter ego issue was not precluded from relitigation, and dismissed Good Samaritan's appeal.

In this case, the *Sandberg* court's finding that the State Farm contract was susceptible to a for-cause termination standard was not necessary to its ultimate affirmance. In fact, as in *Good Samaritan*, the *Sandberg* court could have reached the opposite conclusion on the contractual interpretation issue without affecting its ultimate affirmance. In these circumstances, there is a compelling basis for denying preclusive effect to a finding subsidiary to, and unnecessary to, the holding.

U.S. v. Weems, 49 F.3d 528 (9th Cir. 1995), which Appling relies upon to rebut this point, is not really at odds with State Farm's position. *Weems* granted collateral estoppel effect to the previous determination that the defendant was an innocent owner of property in a civil forfeiture proceeding in the subsequent criminal trial. After reiterating that only findings necessary to the judgment were the proper basis for collateral estoppel, *Weems* held that the prior ruling was, in that the finding changed the statutory basis under which the forfeiture should be sought. Thus, *Weems* on its facts does State Farm's arguments little harm.

3. Preclusive Effect of Harmful Findings in Favorable Judgment

The *Parklane Hosiery* standards as interpreted by Ninth Circuit requires that the intended preclusive finding be made in a decision adverse to the party against whom preclusion is subsequently sought. *Pena v. Gardner*, 976 F.2d 469, 472 (9th

Cir. 1992).[5] One rationale for this requirement is that a prevailing party has no ability to appeal that portion of the judgment it is affected by, and thus appellate review is thwarted. The Ninth Circuit has refused to review a positive district court judgment with subsidiary negative findings for the appellant on just this basis. *See, e.g., Fireman's Fund Ins. Co. v. International Market Place*, 773 F.2d 1068 (9th Cir. 1985). Since State Farm would not have had the ability to appeal the portion of the *Sandberg* order, at a general level, the point is availing. This rationale is perhaps weakened in that the precluding court is a court of appeal, not a district court, and thus no "right of appeal" would entail even for adverse judgments.

4. Full and Fair Litigation of the Issue Decided

State Farm's analysis on this issue pertains to the timing and consideration of the *Bionghi* decision, which it claims would have led the Ninth Circuit to a different result under California contract interpretation law, relative to the *Sandberg* argument and order. *Sandberg* was argued and submitted on February 1, 1999. *Bionghi* was decided on March 30, 1999, and submitted for the panel's attention without comment by State Farm, pursuant to F.R.A.P. 28(j). The *Bionghi* decision is mentioned nowhere in the *Sandberg* disposition, filed on May 13, 1999. In its petition for rehearing, State Farm argued the importance of *Bionghi*, but the request for rehearing was denied without comment in July. (Doolittle Decl., Exh. R, S).

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5 *But see, e.g., Clark v. Bear Stearns*, 966 F.2d 1318 (9th Cir. 1992), citing the Eleventh Circuit standard, which does not incorporate the "adverse judgment" prong of the collateral estoppel test.

Upon this timeline, State Farm contends that it was denied a full and fair opportunity to litigate the contract interpretation issue. Appling counters that the submission of *Bionghi*, and the panel's implicit consideration of the case, without argument in the initial stage and with vigorous argument in the rehearing petition stage, means that the issue was fully and fairly litigated and thus that the Court's denial of preclusion based on *Bionghi* would be improper. The Court finds that Appling has the better of the argument on this point. While *Bionghi* is not explicitly mentioned or tacitly distinguished in the *Sandberg* memorandum, the Court is unwilling to draw the stark interference urged by State Farm, *i.e.*, that the case was improperly ignored by the panel. Mere omission of this single appellate court case from the written opinion is not enough to support the conclusion that State Farm was denied a full and fair opportunity to litigate the issue in *Sandberg*.

After weighing of all of the factors identified by *Parklane Hosiery* and its Ninth Circuit progeny, the Court finds that the unfairness to State Farm of holding *Sandberg* against it as collateral estoppel outweighs any benefits or efficiencies that collateral estoppel might yield here. Therefore, the Court exercises its discretion by declining to give *Sandberg* collateral estoppel effect in regard to the interpretation of the termination clause in the State Farm contracts at issue. Accordingly, under Circuit Rule 36(3), the Court is bound not to cite or rely on *Sandberg* in its determination of the issues.

II. The Parties' Motions Regarding Termination Standard

I. Contract Interpretation

A. Legal Standards

In *Pacific Gas & Electric v. G.W. Thomas Drayage*, 69 Ca.2d 33 (1968), the California Supreme Court set out the rules governing the use of parol evidence in contract interpretation. *P G&E* makes clear that extrinsic evidence has a role in contract interpretation, even where the term to be construed is integrated. In so doing, *P G&E* forbids courts from truncating an inquiry where it determines that the contractual language at issue has a plain meaning. Specifically, *P G&E* envisions a two-part inquiry to be undertaken prior to evaluating the proper role of extrinsic evidence. First, the reviewing court must look to the contract and see if its is integrated. Where it is, as here, the Court's second inquiry is whether the contractual language is "reasonably susceptible" to the meaning urged upon it by the movant. In so doing, the reviewing court may consider extrinsic evidence "so that the court can place itself in the same situation in which the parties found themselves at the time of contracting. If the court decides, after considering this evidence, that the language of a contract, in the light of all the circumstances, 'is fairly susceptible of either one of the two interpretations contended for...' extrinsic evidence relevant to prove either of such meanings is admissible." 69 Cal.2d at 39-40. Where the contractual language is not deemed capable of alternative meanings after this limited consideration of the extrinsic evidence, a court may proceed.

Courts have subsequently cautioned against overutilization of extrinsic evidence under *P G&E,* particularly urging that the parol evidence rule, codified by statute (Code Civ. Proc. § 1856), not suffer in its wake. "[The *P G&E* rule] must be restricted to its stated bounds; it does no more than

allow extrinsic evidence of the parties' understanding and intended meaning of the words used in their written agreement. While it allows parol evidence for this purpose, it is unconcerned with collateral agreements." *Brawthen v. H&R Block*, 28 Cal.App.3d 131, 136 (1972). *Bionghi* states the issue even more sharply.

> *Pacific Gas and Electric* is thus not a cloak under which a party can smuggle extrinsic evidence to add a term to an integrated contract, in defeat of the parol evidence rule. Instead, it calls for a two-step process. First, the court must determine whether the language of the contract is reasonably susceptible to the meanings urged to show that the parties' understanding of words used differed from the by the parties. In so doing, the court must give consideration to any evidence offered common understanding. If the court determines that the contract is reasonably susceptible of the meanings urged, extrinsic evidence relevant to prove the meaning agreed to by the parties is admissible.

Bionghi, 70 Cal.App.4th at 1365.

Thus, the Court must limit its consideration of the extrinsic evidence in interpreting an integrated contract to give meaning to the contractual language, and not to add, subtract or modify terms in violation of the parol evidence rule.

B. Policy Language

The contracts at issue (the AA3, AA4 and AA660, and its corporate versions) all include specific provisions regarding the termination of the contract. For the individual contracts, the

relevant language reads: "You or State Farm have the right to terminate this Agreement by written notice delivered to the other or mailed to the other's last known address."[6] AA3 and AA4 Agreements, section III(A); AA660 Agreement, section III(1). The corporate versions of these same agreements provide similar language. All of the contracts at issue incorporate an integration clause, which reads: "This Agreement constitutes the sole and entire agreement between the parties hereto, and no change, alteration, or modification of the terms of this Agreement may be made except by agreement in writing signed by an authorized representative of the Companies and accepted by you." AA3 and AA4 Agreements, section VI(E); AA660 Agreement, section V(5).

C. Extrinsic Evidence

Both parties offer extrinsic evidence to support their reading of the relevant contractual term. While this is appropriate under *P G&E* to elucidate the plain meaning of the terms, the Court's role in interpreting this extrinsic evidence is (1) limited to information that would assist in putting the Court in the position of the parties at the time the contract was negotiated, and (2) in the case of an integrated contract, limited to explicating, not varying or adding, existing term language.

As a general point, little of the extrinsic evidence offered by either party strictly adheres to the *P G&E* test, in that none of it is contemporaneous with the negotiation and drafting of the relevant language. Also absent from the record is the testimony of any plaintiff indicating that he or she believed the clause at the time of contracting to provide for termination for

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6 This replaced termination language providing for termination "with or without cause." (Doolittle Decl., Exh. L).

cause. What is set forth instead is largely a battle of the *post hoc* interpretation of the term. With that constraint in mind, the Court now turns to a summary of the extrinsic evidence offered by both sides.

1. Appling's Proffer

Appling offers three broad types of evidence which it claims bear on the question of interpreting the contract's reasonable susceptibility to an interpretation of good-cause termination. First, Appling points to the prior generation of contracts (none of which are at issue here) wherein the term "with or without cause" was included in the termination provisions. (Doolittle Decl., Exh. L.) State Farm removed that term from its standard individual and corporate contracts, inserting in its place a provision allowing termination by either party on written notice. Appling contends that this omission constitutes an abandonment of a strict at-will termination policy. Second, the introduction of a termination review process was instituted, providing the terminated agent an opportunity to air his/her grievance in accordance with procedures established by State Farm's Board of Directors. (Doolittle Decl., Exh. U). Appling asserts that this structure, insofar as it is an affirmative entitlement for employees, is inconsistent with an at-will termination clause. Third, Appling points to comments in employee literature and corporate guidebooks in the wake of the relevant contract revisions made by State Farm executives, indicating that no termination would be effectuated except in the case of serious infractions. Doolittle Decl., Exh. K.

Again, what is lacking in any nexus between this evidence and the contemporaneous, subjective states of mind of any of the agent contractors. Without that critical link, it is difficult if not impossible to envision a scenario by which the contractual terms could be substantially enhanced by reference to this extrinsic evidence. A contracting party cannot be held

to convert what would otherwise be an at-will termination obligation into a for-cause provision by virtue of its own acts to ensure termination occurs only for acceptable reasons. To so hold would risk chilling contracting parties' own efforts to maintain the contractual relationship, lest their own cooperation increase their contractual obligation under an implied-in-fact contract theory. *See, e.g., Davis v. Consolidated Freightways*, 29 Cal.App.4th 354, 367 (1994). Performance and bargained for rights must remain distinct, and can converge only where the extrinsic evidence supports such a unity. It does not here.

2. State Farm's Proffer

For its part, State Farm attempts to show that the terminated agents would have understood that the contract's terms allowed at-will termination. For this, State Farm points to repeated excerpts from agent association newsletters explaining the contracts as at-will. (Brick Decl., Exhs. L, P, Q, R, S, T, V). Also offered are percipient witness testimony for State Farm representatives, who claim that all sides understood at the time the new contract were introduced that a for-cause provision was not incorporated therein. (Joslin, Robinson Decls). Other evidence suggests this understanding inferentially, such as newsletter articles advocating an explicit "just cause" provision in the contract, and expressing fear that the termination review board procedures would protect agents' contractual rights adequately. (Brick Decl., Exhs. M, N, O, R, U, W, Y). Again, the Court bears in mind that much of this proffer is outside of the realm of what *P G&E* would have a reviewing court consider, but that is not to marginalize this proffer entirely. On this record, there lacks a body of extrinsic evidence that would under *P G&E* render the contractual termination language susceptible to a for-cause meaning.

D. State Farm's Motion

State Farm's motion is legally based upon its interpretation upon *P G&E, Masterson v. Sine*, 68 Cal.2d 222 (1968), and the subsequent treatment of those cases in *Bionghi*. State Farm has also pointed to the decisions of a half-dozen different courts construing this identical language to provide for at-will termination. *Mooney v. State Farm*, 344 F.Supp. 697 (D.N.H. 1972); *Vitkauskas v. State Farm*, 509 N.E.2d 1385 (Ill. App. Ct. 1987); *Melnick v. State Farm*, 106 N.M. 726 (N.M. 1988); *Drum v. State Farm*, S.F. Superior Ct. Case No. 991165 (Nov. 30 1998) (Req. Jud. Not., Exh. A); *Lotten v. State Farm*, Contra Costa Superior Ct. Case No. 97-01951 (July 30, 1998) (Req. Jud. Not. Exh. B); *Peters v. State Farm*, Case No. 85-2177-S (D. Kan. 1996) (Req. Jud. Not. Exh. C); *Scola v. State Farm*, Case No. 1-49685 (1st Dist. 1981) (Req. Jud. Not., Exh. D).

For its part, Appling points the Court strongly to *Wallis* for guidance in how to interpret *P G&E*. Clearly, the two appellate decision are in tension. While it is the Court's duty to look to state appellate law for guidance, it cannot do so unambiguously where decisions are at tension with one another, and must resolve the question ultimately as the California Supreme Court would. Ultimately, the Court is spared the task of choosing between *Bionghi* and *Wallis* by the fact that an application of *P G&E* offers the necessary guidance to resolve the motion. *P G&E* cautions the reviewing court against relying on its plain meaning analysis alone to discern the meaning of contract terms. The analysis must begin there, however, and the language seems on its face explicitly to provide an at-will termination provision for either contracting party. The Court must, however, evaluate the extrinsic evidence under *P G&E* to ascertain whether the language is susceptible of meaning other than its literal reading. On this point, Appling's proffered information is of minimized importance as a matter of law. First, on the issue of prior contractual language Appling's

argument relies on the absence of language. The evidence offered nowhere suggests that the omission of the term "with or without cause" essentially means "with cause." On the contrary, State Farm's own in-house memoranda suggest that the contractual term is at will. (*See, e.g.*, Brick Decl., Exh. L). Similarly, meetings held at the time the contracts at issue were introduced to State Farm agents in 1968 and 1976 confirms that the corporation and agent representatives understood the contracts to be terminable at will. (Joslin Decl., Robinson Decl.) Further, and most saliently under *P G&E*, Appling points to nothing in the record to suggest the terminology in the contract meant other than what it says, and has thereafter been interpreted by State Farm and agent representatives to say, to any plaintiff at the time of contracting. Second, as to the establishment of a termination review process under the 1977 amendments, California law suggests that an employer should not be penalized for going the extra step to ensure all terminations are well-based by turning a procedure designed to foster that goal into an affirmative, substantive contractual right. *Davis, supra.* Third, employee bulletins explaining the termination review process as limiting termination to cases of serious contractual violations (Doolittle Decl., Exh. F at 3) do not rise to the level of converting at-will language to for-cause. Again, Appling points to no specific competent evidence in that document that would actually change the reasonably susceptible meaning of the term from at-will to for cause. On the contrary, many of the exhibits offered by Appling permit the opposite conclusion, and that the representatives of the State Farm agents were aware, at least after the fact, that the contracts were, terminable at will. Telling evidence of this is the agents' expressed concerns about inadequate substantive protections in the wake of the 1977 contractual amendments, and a call for an explicit "just cause" provision in future contracts. (Brick Decl., Exhs. M, N, O, R, U, V, Y).

Although the Court is mandated by *P G&E* to focus upon the parties' intent at the time of entering into the contract,

and should not be distracted by the post-contractual interpretations of either side, it is clear that even an charitably overbroad consideration of extrinsic evidence does not help Appling's cause on this point. The Court cannot envision a scenario whereby Appling's proposed interpretation could vary the language of the termination clause. With that conclusion, the Court is bound to accord the language its meaning, and, consistently with several other courts, finds that the language connotes an at-will contractual agency. Accordingly, the Court DENIES Appling's motion for summary judgment of a for-cause interpretation, and GRANTS State Farm's countermotion for summary judgment of a contractual agreement mutually terminable at will.

While the Court's ruling is pursuant to California law, many of the agent plaintiffs are not California residents, and California law has no place in consideration of their claims. The thumbnail overview of foreign law offered by the parties briefs suggests that while some states' contract law fashion a role for extrinsic evidence in interpretation of integrated contracts that is similar, if not functionally identical, to California's, other states utilize the "plain meaning" rule prevalent in California pre-*P G&E*. The Court is unwilling, however, to make wholesale rulings on the state of the law in other jurisdictions in the summary fashion urged by the parties, and therefore limits its ruling on the motion before it to claims arising under California law.[7] However, the parties are

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7 Therefore, the Court's ruling impacts the claims of the following plaintiffs: Appling, Brumfield, Castroll, Cornielson, Cusimano, Doctor, Farrell, Gilmore, Gordon, Julian Insurance Agency, Kennedy Insurance Agency, Lefton, Perry, Pickett, Searcy, Walker, and Walton Insurance Agency. Plaintiffs Pyorre and Wier are not parties to this motion, as the Supplemental Complaints implicating

(continued...)

requested in the interests of judicial economy to confer, and stipulate to the out-of-state plaintiffs whose claims are necessarily impacted by the Court's treatment of the extrinsic and intrinsic evidence in this memorandum and order. A case management conference will be held on February 15, 2000 at 2:00 p.m. to discuss this and other issues further.

CONCLUSION

For the reasons set forth above, Appling's motion for partial summary judgment on the basis of collateral estoppel is DENIED, as is Appling's motion for summary judgment on contractual interpretation of the termination clause. State Farm's countermotion as to the contractual interpretation issue is GRANTED, as the Court finds that the AA3, AA4 and AA660 State Farm agent contracts, and their corporate counterparts, provide as a matter of California law for termination at will by either party.

IT IS SO ORDERED.

Dated: 01/07/2000

/s/
MARTIN J. JENKINS
U.S. DISTRICT JUDGE

(...continued)
their claims was never served on State Farm. Plaintiffs' counsel is reminded of his representation to this Court at oral argument on December 14, 1999 in the now-dismissed *State Farm v. Pyorre and Wier*, Case No. 99-4668 MJJ, that Pyorre and Wier would be dismissed from the case altogether. To date, the civil docket does not reflect any attempt or request to dismiss these plaintiffs from present action.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

WILLIAM A. APPLING, et al.,	)	No. C 01-3181 MJJ
	)	
Plaintiffs,	)	**ORDER GRANTING**
	)	**WITH PREJUDICE**
v.	)	**DEFENDANTS'**
	)	**MOTION TO DISMISS**
STATE FARM MUTUAL AUTO. INS. CO., et al.,	)	**FIRST AMENDED**
	)	**COMPLAINT TO SET**
	)	**ASIDE PART OF**
Defendant.	)	**SUMMARY**
	)	**JUDGMENT IN CASE**
_____/	)	**NO. C 97-1569 MJJ**

INTRODUCTION

Before the Court is a motion to dismiss the first amended complaint pursuant to Federal Rules of Civil Procedure 12(b)(6) brought by Defendants State Farm Mutual Automobile Insurance Company, State Farm Fire and Casualty Company, State Farm Life Insurance Company, and State Farm General Insurance Company (collectively "State Farm"), and Orrick Herrington & Sutcliffe LLP ("Orrick").[1] This motion

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1 Together with the motion, State Farm and Orrick (collectively "Defendants") submit a request for judicial notice of documents referenced in Plaintiff's first amended complaint, and court records in an underlying case. Consideration of such documents does not convert

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requires the Court to determine whether Plaintiffs meet the criteria to bring an independent action to set aside part of the summary judgment in a prior matter entitled *William Appling, et al. v. State Farm Mut. Auto. Ins. Co.*, No. CV 97-1569 MJJ ("1997 Action") for fraud upon the court pursuant to Federal Rule of Civil Procedure 60(b).[2] For the following reasons, the Court GRANTS WITH PREJUDICE Defendants' motion.

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Defendants' motion into a motion for summary judgment and is proper. *See Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001) (finding that courts may consider documents which are not physically attached to the plaintiff's complaint if their authenticity is not contested and the complaint necessarily relies on them); *In re American Continental Corp. Lincoln Savings and Loan Sec. Lit.*, 102 F.3d 1524, 1537 (9th Cir. 1996), *reversed on other grounds by Lexecon, Inc v. Milberg Weiss Bershad Hynes & Lerach*, 520 U.S. 26 (1998) (finding that courts may take judicial notice on "matters of public record, including court records in related or underlying cases which have a direct relation to the matters at issue" without converting the motion into one for summary judgment). In addition, Plaintiffs filed no objections to Defendants' request for judicial notice. As such, the Court GRANTS Defendants' request and considers the documents attached thereto as part of the record in resolving the motion.

2 Rule 60(b) provides, in relevant part, that "this rule does not limit the power of a court to entertain an independent action ... to set aside a judgment for fraud upon the court."

FACTUAL BACKGROUND

In the 1997 Action, Plaintiffs alleged, among other things, that State Farm breached certain of its contracts with the agents who sell State Farm insurance products to customers when it terminated its agents without cause. *See* First Amended Complaint ("FAC") at ¶¶ 9-10. Plaintiffs moved for summary judgment as to the issue of the termination provisions. State Farm brought a counter motion arguing that State Farm had the absolute right to terminate its agents at will and without any cause under the terms of the contract. *See Id. at* ¶ 11; *see also* 1997 Action, slip op. at 1 (N.D. Cal. filed January 7, 2000) ("2000 Order") (stating that "[Defendants] countermoved the Court for determination that the employment contracts are integrated and unambiguously provide that employment is terminable at will.").

Plaintiffs submitted with their motion evidence it claimed went to the question of whether the termination provisions, which provided for termination upon notice, were reasonably susceptible to an interpretation of good-cause termination. First, Plaintiffs pointed to the prior generation of contracts in which the term "with or without cause" was included in the termination provisions. Plaintiffs argued that when State Farm, in 1966, inserted a provision allowing termination by either party on written notice in the place of the "with or without cause" provision, State Farm abandoned its strict at-will termination policy. *See* 2000 Order at 11. Second, Plaintiffs argued that the implementation of a termination review process for its agents by State Farm was inconsistent with an at-will termination clause. *See Id.* Finally, Plaintiffs pointed to comments in employee literature and corporate guidebooks in the wake of the relevant contract revisions indicating that no termination would be effectuated except in the case of serious infractions. *See Id.*

After considering all of the information provided by Plaintiffs, this Court, in its 2000 Order, granted State Farm's motion.[3] *See* FAC at ¶ 12; *see also* 2000 Order at 14. It made its decision after finding that it was "difficult if not impossible to envision a scenario by which the contractual terms could be substantially enhanced by reference to [the extrinsic evidence proffered by Plaintiffs]" because the evidence lacked "any nexus" with the contemporaneous subjective states of mind of the agent contractors. *See* 2000 Order at 11.

On August 20, 2001, Plaintiffs filed the instant action to set aside the 2000 Order, or in other words, the summary judgment in the 1997 Action as to the termination claims. On October 30, 2001, Plaintiffs amended their complaint.

Plaintiffs bring their action on grounds that the judgment was a product of fraud on the Court because State Farm and Orrick "(a) fraudulently purport[ed] to represent a witness and fil[ed] fabricated comments and objections to a subpoena directed to that witness, without informing the witness or obtaining the witness' authorization[;] and (b) by fraudulently misrepresenting to [Plaintiffs] that the witness, a former State Farm official, had no documents or knowledge concerning the subject matter of the lawsuit." *Id.* at ¶ 2. The allegations of fraud stem around the conduct of Orrick, and thereby State Farm, in responding to certain subpoenas issued by Plaintiffs in the 1997 Action. *See* FAC at ¶¶ 31-35, 40-42. One such subpoena was issued against Henry Keller, a State

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3 The decision is currently on appeal with the Ninth Circuit; however, the Ninth Circuit has stayed its proceedings, on Plaintiffs' motion, pending resolution of the instant independent action. *See* Plaintiffs' Opposition to Defendants' Motion to Dismiss ("Opposition") at 2; *see also* Opposition, Exh. C.

Farm executive who had retired from his position in 1976.[4] *See Id.* at ¶¶ 31-15; *see also* Request for Judicial Notice ("RJN"), Exh. A. The other subpoenas were issued on State Farm itself. *See* FAC at ¶¶ 40-42.

With respect to the Keller subpoena, Plaintiffs allege that during the initial discovery period in the 1977 Action, Plaintiffs, through one of their counsel, Wallace Doolittle, subpoenaed Keller. *See* FAC at ¶¶ 18, 36. Keller contacted State Farm about the subpoena because he had "no familiarity with the litigation" and State Farm advised that it would handle the matter. *Id.* at ¶ 36; *see* FAC, Exh. E (Second Declaration of Henry Keller ("2d Keller Decl.")) at ¶ 11. Keller expected to receive information from State Farm about the litigation and expected some assistance with respect to the mechanics of responding to the subpoena, but did not hear from State Farm about it again. *See Id.*

In response to the Keller subpoena, Orrick filed objections, purportedly on Keller's behalf, to the location and

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4 With the subpoena, Plaintiffs sought the following:

1. Any and all documents regarding [State Farm], or any and all other State Farm entities from, and including, January 1, 1988 to the present.

2. Any and all correspondence with any representative, employee, officer, director, agent, consultant or and all other persons working for or with [State Farm], or any and all other State Farm entities from, and including, January 1, 1988 to the present.

RJN, Exh. A at Attachment A. Plaintiffs did not seek to depose Keller. *See Id.* at 1.

date of the production demanded and the relevance of the requests made. *See* FAC, Exh. B (Declaration of Wallace C. Doolittle re: Discovery Meet and Confer). In addition, Orrick objected on grounds that the requests (1) imposed an undue burden, (2) were unnecessarily broad, vague and ambiguous, (3) sought documents already in Plaintiffs' possession or obtainable from some other source, (4) sought disclosure of privileged material, and (5) violated Keller's privacy rights under the Florida Constitution. *See Id.* Thereafter, during a "meet and confer session" Orrick purportedly advised Plaintiffs that Keller "'ha[d] no documents and no knowledge concerning the subject matter of the lawsuit' and that it was therefore inappropriate for [Doolittle] to be unfairly burdening an elderly man such as [Keller]." *Id.* at ¶ 19. This conduct, according to Plaintiffs, constituted fraud sufficient to warrant an independent action to set aside the judgment because the objections and meet and confer were made without Keller's knowledge, absent his consent, and despite Keller's willingness to cooperate and produce materials[5] Plaintiffs contend would have led to the

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5 Plaintiffs specifically identify some of the material which would have been produced as, among other things, a letter prepared by Keller to State Farm in 1997 ("1997 Letter"), a video featuring Keller's presentation regarding independent contractor agents made in 1974 ("1974 Video"), and a video of Keller being interviewed by State Farm in 1988 ("1988 Video"). *See* FAC at ¶¶ 27-30. Plaintiffs purport that these materials pertain to the 1966 amendment of the agents' contracts to delete the terms "with or without cause" in the termination provision, and explicitly show that Keller rewrote the contract as an executive of State Farm in 1966 in response to the agents' concerns regarding State Farm's ability to arbitrarily terminate them. *See* Opposition at 5. This information, according to Plaintiffs, would have led Plaintiffs to Keller, who would then have

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preparation of declarations by Keller stating that State Farm amended its agent contracts in 1966 to reflect its intent to change the termination provision from one which allowed State Farm to terminate at will to one which only allowed State Farm to terminate its agents for good cause. *See* Opposition at 5.

With respect to the State Farm subpoena, Plaintiffs allege that had Defendants properly produced all material responsive to the document request, Defendants would have produced the same documents Plaintiffs now contend would have led to Keller. *See* FAC at ¶¶ 40-42. Defendants' failure to produce the documents constituted, according to Plaintiffs, fraud on the Court warranting the independent action. Plaintiffs further assert that had the record in the 1997 Action contained the Keller Declarations, the it would have had evidence of the contemporaneous subjective intent of State Farm at the time of the 1966 revisions, and this Court would not have been able to find for Defendants. *See* FAC at ¶ 34. In support, Plaintiffs rely on a recent California court's finding that the same termination provision could be interpreted to be a "for cause" provision. *See Id.* at ¶ 21; *see also Id.*, Exh. C (*State Farm Mut.*

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testified, that he rewrote the contracts with the intent of abandoning the at-will termination provisions. *See Id.; see also* FAC, Exhs. D (Declaration of Henry Keller ("Keller Decl.")) at ¶¶ 14-17 (stating that State Farm made efforts to amend the agent contracts to assuage the agents' concerns about being terminated arbitrarily, and State Farm made the changes so that the agents could no longer be terminated without cause) and E (2d Keller Decl.) at ¶¶ 4-5, 7, 10 (stating same).

Auto. Ins. Co. v. Wier, N. 82819, slip op. at 3 (Mendocino Superior Court July 3, 2001) ("Mendocino Order").[6]

Defendants now move to dismiss the action, arguing that the purported fraud claimed by Plaintiffs, even if true, is not a fraud upon the court, as it must be, to support an independent action. *See* Motion to Dismiss ("Motion") at 21. Specifically, Defendants contend that Orrick could not have committed fraud by virtue of having responded to a subpoena with valid objections on behalf of Keller, a long time State Farm employee. *See Id.* In addition, Defendants assert that the content of the material Plaintiffs contend were suppressed by Defendants during the 1997 Action was already before the Court and therefore would not have changed the outcome. *See Id.* Finally, Defendants argue that the failure to obtain the relevant evidence from Keller was entirely the product of Plaintiffs' own inadvertence and lack of due diligence.[7] *See Id.*

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6 Plaintiffs claim that the Mendocino Court expressly relied on the missing Keller declarations in making its determination. The Mendocino Order is not, however, as clear, stating only that it had before it "evidence which was not before [this Court] in the [1997 Action]" without identifying specifically to the documents it referred. *See* Exh. C at 3 (Mendocino Order).

7 Notably absent from Defendants' motion is any argument pertaining to the allegations in the FAC that State Farm failed to produce documents responsive to subpoenas, among which were the 1997 Letter and the 1988 Video. Because, however, the material alleged to have been withheld and the consequences thereof are the same as to both the State Farm subpoena and the Keller subpoena, the failure is immaterial.

LEGAL STANDARD

A Rule 12(b)(6) motion to dismiss tests the legal sufficiency of the claims asserted in the complaint. *Cahill v. Liberty Mutual Ins. Co.*, 80 F.3d 336, 337 (9th Cir. 1996). Dismissal of an action is appropriate only where it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Levine v. Diamanthuset, Inc.*, 950 F.2d 1478, 1482 (9th Cir. 1991). The Court will dismiss the complaint or any claim in it without leave to amend only if "it is absolutely clear that the deficiencies of the complaint could not be cured by amendment." *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987).

In determining a motion to dismiss, the Court must assume all factual allegations to be true and must construe them in the light most favorable to the non-moving party. *See North Star Int'l v. Arizona Corp. Comm'n*, 720 F.2d 578, 580 (9th Cir. 1983). However, the Court need not accept as true unreasonable inferences, unwarranted deductions of fact, or conclusory legal allegations cast in the form of factual allegations. *See Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981). Further, the Court need not accept as true allegations that contradict facts that have been judicially noticed or by exhibit attached to a complaint. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988-89 (9th Cir. 2001).

ANALYSIS

Plaintiffs here seek to set aside the 2000 Order on the basis that Defendants intentionally and purposefully withheld certain information, the effects of which were to shield Keller and prevent Plaintiffs from obtaining declarations from him which stated that State Farm, in amending the termination provision in its agents contracts, intended to implement a "for

cause" termination policy. Defendants move to dismiss the action on grounds that the purported fraud claimed by Plaintiffs, even if true, is not a fraud upon the court, as it must be, to support an independent action because (1) Orrick did not commit fraud by having responded to a subpoena with valid objections on behalf of Keller, a long time State Farm employee; (2) the content of the material Plaintiffs seek were suppressed by Defendants during the 1997 Action was already before the Court and therefore would not have changed the outcome; and (3) the failure to obtain the relevant evidence from Keller was entirely the product of Plaintiffs' own inadvertence and lack of due diligence.

Federal Rule of Civil Procedure 60(b) provides, in part, that "any relief from a judgment shall be by motion as prescribed in these rules or by an independent action." An independent action is warranted "to set aside a judgment for fraud upon the court." Fed. R. Civ. Pro. 60(b).

Independent actions must, if Rule 60(b) is to be interpreted as a coherent whole, be "reserved for those cases of 'injustices which, in certain instances, are deemed sufficiently gross to demand a departure' from rigid adherence to the doctrine of res judicata." *United States v. Beggerly*, 524 U.S. 38, 46 (1998). To constitute fraud on the court, the alleged misconduct must "harm[] the integrity of the judicial process." *In re Levander*, 180 F.3d 1114, 1119-20 (9th Cir. 1999) (finding that "'[f]raud upon the court' should, we believe, embrace only that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judiciary machinery can not perform in the usual manner its impartial task of adjudging cases that are presented for adjudication.") (internal citations omitted).[8]

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8 Defendants cite to a number of cases and for

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Construing the allegations in Plaintiffs' favor, as this Court must, the fraud, simply, can be stated as Orrick having tricked Plaintiffs into believing that Keller had no responsive documents and no knowledge relevant to the litigation.[9] The

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the proposition that there are three factors which must be met before the fraud on the court might support an independent action under Rule 60(b). First, Defendants argue that the plaintiff must demonstrate that the defendant engaged in conduct that arises to the level of extrinsic fraud which, in other words, means that the conduct "so gravely subverted the judicial process as to deprive the plaintiff of his or her 'day in court.'" *See Green v. Ancora-Citronelle Corp.*, 577 F.2d 1380, 1384 (9th Cir. 1978). Second, Defendants argue that the plaintiff must demonstrate that the new evidence is material. *See Beggerly*, 524 U.S. at 47 n.4. Finally, according to Defendants, the plaintiff bears the burden of showing that he exercised due diligence in pursuing the evidence in the original action. *See MCI Tel. v. Matrix Comm.*, 171 F.R.D. 7, 9 (D. Mass. 1997). The Court does not agree with Defendants as to the rigid formula they present in determining whether the independent action is justified. However, the Court notes that the factors and analysis identified by Defendants are consistent with the test set forth above by this Court.

9 Here, Plaintiffs alleged that Defendants intentionally withheld evidence which would have otherwise led Plaintiffs to Keller by "pretending" to represent Keller, filing false objections on his behalf absent his knowledge or consent, and representing to Doolittle that Keller did not have any documents responsive to the subpoena and did not have any knowledge as to the litigation. Defendants argue that Orrick did not "pretend" to represent Keller and instead did

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Court must, therefore, determine whether Defendants' efforts to convince Plaintiffs that Keller had nothing responsive constituted a fraud upon this Court which would justify the relief sought.

Helpful in the analysis is a discussion of two cases in which the Second Circuit and Ninth Circuit respectively considered the issue of whether non-disclosure or perjury constituted fraud on the court. The Second Circuit, in *Gleason v. Jandrucko*, 860 F.2d 556 (2nd Cir. 1988), found that non-disclosure of evidence or perjury, without more, does not constitute fraud on the court where the allegedly defrauded party had the opportunity to challenge the alleged perjured testimony or non-disclosure. *See Id.* at 559-60. In *Gleason*, the plaintiff sought to set aside the judgment against him in light of having discovered that the police officers who testified against him lied about the strength of the eye witness accounts. *See Id.* at 558. The Second Circuit affirmed the lower court's finding that the alleged perjury could not sustain an independent action because (1) the plaintiff could have deposed the eyewitnesses

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represent him in light of the fact that Keller, by his own declaration, claims to have contacted State Farm about the subpoena and was told that it would take care of it. In addition, Defendants argue that the objections to the subpoena were not "false" as contended by Plaintiffs but instead valid. The Court is disinclined to construe Orrick's conduct with respect to the representation of Keller was anything but proper especially in light of Keller's declaration that he called State Farm about the subpoena and was told that State Farm would take care of it. In addition, at first glance, the objection made on Keller's behalf are innocuous. The Court, however, makes no conclusive finding to the extent that doing so is not necessary to the resolution of the motion here.

and introduced evidence at trial to impeach the police officers' testimony; and (2) the issue of the officers' credibility was before the court. *See Id.* at 559-60. The Second Circuit concluded that the plaintiff could not, after the fact, claim fraud on the court based only on alleged perjury by the officers, which he could and should have challenged during the trial. *See Id.*

In *Levander*, 180 F.3d 1114 (9th Cir. 1999), the Ninth Circuit found that *Gleason* did not apply where the allegedly defrauded party had no opportunity to challenge the allegedly perjured testimony or non-disclosure of evidence. *See Id.* at 1119-20. In *Levander*, the plaintiff brought an independent action to set aside judgment for attorney's fees on grounds that the party against whom attorney's fees were imposed, the Corporation, had defrauded both the plaintiff and the court by having testified under oath that it had not transferred any of its assets when in fact it had transferred its assets to nineteen corporate entities, which then conveyed the assets to a partnership, which then sold the assets to a former employee for one dollar. *See Id.* at 1117, 1120. Relying on the Corporation's alleged perjured statements, however, the court imposed attorneys' fees on the Corporation rather than the partnership, the party with the assets. *See Id.* Because neither the court nor the plaintiffs knew that the partnership existed and, as a result, the issue was never before the court, the Ninth Circuit affirmed the lower court's finding that the perjury constituted a fraud upon the court which would sustain the independent action to set aside the judgment. *See Id.*

Construing the facts alleged to be true, Orrick, like the defendants in *Levander* who testified under oath that it still maintained all of the assets, affirmatively put Plaintiffs on the wrong track by representing to Plaintiffs Keller's position and assuring Doolittle that Keller had no documents and no knowledge of relevant facts. Orrick's conduct, however, falls short of the defendants' efforts described in *Levander* in that Orrick did not have State Farm testify under oath that Keller

had no information. In addition, it did not make concerted efforts to conceal or disguise the circumstances surrounding the 1966 amendment of the termination provision. *See generally England v. Doyle*, 281 F.2d 304, 310 (9th Cir. 1960) (finding that the plaintiff's non-disclosure of a stipulation, among other things, did not display an "unconscionable plan or scheme" designed to influence the decision of the court to warrant setting aside the judgment with an independent action). Instead, Orrick objected to subpoenas on behalf of Keller and represented to Plaintiffs that Keller had no responsive documents or information. All the while, Plaintiffs knew enough to have subpoenaed Keller personally, as opposed to having had subpoenaed the person most knowledgeable at State Farm.

That Doolittle, on behalf of Plaintiffs, made a tactical decision not to pursue production from Keller by seeking to compel discovery based upon Orrick's objections or representation is more analogous to the plaintiff's failure to test the police officers' testimony in *Gleason* where the identity of the eyewitnesses was known to the plaintiff and the issue of the officers' credibility was before the court. Mindful that the relief sought by Plaintiffs here under Rule 60(b) is appropriate in limited circumstances and reserved for those cases of injustice which "are deemed sufficiently gross to demand a departure from rigid adherence to the doctrine of res judicata," *Beggerly*, 524 U.S. at 46, the Court finds that the relief cannot be invoked where, as here, a party makes a tactical decision which, in the end, results in the non-disclosure of evidence it later finds is important to its case. Therefore, the Court GRANTS Defendants' motion to dismiss. The dismissal is with prejudice in light of the Court's finding that Plaintiffs are unable to cure the deficiencies identified here.

CONCLUSION

For the foregoing reasons, the Court GRANTS Defendants' motion to dismiss. The action is DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

Dated: January 31, 2002

_____/s/_____
MARTIN J. JENKINS
U.S. DISTRICT JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

WILLIAM A. APPLING, et al., Plaintiffs,	)	No. C 01-3181 MJJ
v.	)	**JUDGMENT IN A CIVIL CASE**
STATE FARM MUTUAL AUTO. INS. CO., et al Defendant.	)	

__ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED
that the Court GRANTS Defendants' motion to dismiss.

February 6, 2000
Date

Richard Wieking
Clerk

/s/
(By) Deputy Clerk